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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 15

CLARENCE DeBACKER, *Appellant*,

v.

HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, *Appellee*.

APPEAL TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLEE

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In The

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OCTOBER TERM, 1968

No. 662

CLARENCE DeBACKER, *Appellant*,

V.

HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, *Appellee*

APPEAL TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLEE

OPINION BELOW

We accept the Appellant's statement.

JURISDICTION

We accept the Appellant's statement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

We accept the Appellant's statement. Sections 43-201 through 43-220, and Section 25-1933, Reissue Revised Statutes of Nebraska for 1943, are reprinted in Appendix A, *infra*.

QUESTIONS PRESENTED

I

Is the provision of the Nebraska Juvenile Court Act denying juvenile trial by jury in Juvenile Court for an offense which would be triable by a jury if committed by an adult a violation of the Sixth Amendment of the United States Constitution

II

Whether statute providing for proof by a preponderance of evidence in a delinquency proceeding based on conduct which would be a felony if charged criminally violates the Fourteenth Amendment of the United States Constitution

III

Whether the prosecutor's choice of juvenile proceedings or criminal proceedings in a case involving a juvenile violates the Fourteenth Amendment of the United States Constitution

STATEMENT OF THE CASE

We accept Appellant's statement

SUMMARY OF ARGUMENT

I

The purpose of juvenile proceedings is primarily giving aid and guidance to a young person who is in trouble for one of a number of reasons. Juvenile delinquency proceedings which involves a violation of some criminal statute are a part of the juvenile's rehabilitative procedures. The proceedings are informal civil proceedings and a person found to be a delinquent child ad-

determining which case should be taken for the determination of which court it should be filed in.

ARGUMENT

I.

Constitutional Due Process of Law Does Not Require the Intrusion of a Jury Trial in Juvenile Proceedings.

The appellant's "sea of semantic disorder" would hope that a "civil matter" will become a "criminal prosecution" if we label it so often enough and sincerely enough, because, after all, we are better off with "criminal prosecution". An analysis of the juvenile court procedure shows that a juvenile proceeding is in fact and in substance and in form, a civil or at any rate a noncriminal proceeding. The purposes of juvenile proceedings stem basically from the position of the State, under the doctrine of *parens patriae*, but the State of Nebraska, as will later be seen, has carefully followed judicial, as opposed to social, procedures. This concept is recognized in matters of guardianships of minors and in the inability of a minor to contract, except for essentials of life. The logic of the State's position under this doctrine, current maligning of the same notwithstanding, cannot be shaken by such terminology as "big brother" looking after you, and the like. Indeed, at one time we told children "God is watching you." When atheism becomes rampant, we can no longer say, "God is watching you," then we say, "big brother is watching you." This phrase, big brother is watching you, then rides at the conscience of those who still believe in God. Indeed, with no one watching, with no one caring, why should any person be concerned over what they do. The State is the only instrumentality which is in a position to be able to give any meaningful assistance to these individuals, once

the parents and churches have failed. Our juvenile statutes recognize the inability of youth to care for themselves, recognize the immaturity of the young person and the need for additional guidance in correcting them.

As long ago as 1913, the Supreme Court of the State of Nebraska in the case of *State ex rel. Miller* v. *Bryant*, 94 Neb. 754, 144 N. W. 804, in discussing the purposes of a Juvenile Court, stated as follows:

> "* * * * *
>
> "* * *. It may be said that its purpose is to help, not punish, the child. Its functions are largely parental, and it acts in the interests of the child, not adversely thereto. The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help.
>
> "* * * * * *"

The inabilities of our youth are recognized in many other ways. For example, a person in the State of Nebraska must be twenty-one years of age to vote. In Nebraska, a person must be twenty years of age in order to enter into a binding contract for anything other than essentials of life. In Nebraska, a young person must be at least sixteen years old in order to operate a motor vehicle with a driver's license, without some adult being with him. The parental right of discipline extends to any child living in the household of the parent. As of yet, no one has questioned the parents' right to reasonably discipline their children. Parents can, and do, "jail" their children, in that they restrict them to the house and let them out only to attend a school which is operated by a governmental subdivision of the State, or place them in "boarding" or military school.

In Nebraska, as in most states, the State requires that all children between the ages of seven and sixteen attend school when school is in session. The Nebraska statutes also provide that a child under eighteen years of age can be handled in a special way, should he commit a certain set of acts which are criminal in their nature.

Juvenile proceedings in the State of Nebraska, including delinquency, do not carry with it the brand of a conviction of a crime. Section 43-206.03(5), R. R. S. 1943, provides:

> "(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment." (Appendix A, p. 47.)

As a practical matter, if all of the elements of a criminal trial are impressed upon delinquency proceedings, will this proceeding not then be a criminal proceeding?

The immaturity of the young offender is the very reason that he should be handled in a different manner than the criminal adult. The youthful offender is more susceptible of learning that not only certain set of actions are wrong, but at a younger age people are simply more susceptible to learning.

Most people who deal with young people or criminal offenders of any age for that matter, agree that certainty of being caught, followed by some punishment, carries a much higher deterrent effect than an

extremely low possibility of receiving any penalty at all, and having a very severe penalty for some.

One of the most basic ideas in the world is that when a mother tells a child not to touch a hot stove, the child does one of two things. It obeys the mother, or it checks for itself. Idealism would have us believe that all children believe their mother. Practicality tells us that many youngsters burn their fingers when they check the stove. While children are learning, juvenile courts need to be flexible enough to deal with the problems as they come. The juvenile courts cannot be regimented into an IBM machine card and expected to deal adequately with youthful offenders.

In Nebraska a delinquency complaint is tried as a civil trial decided under the District Court rules of civil procedure and provides that the hearing shall be had by the Judge of the court without a jury. Section 43-206.03(2), R. R. S. 1943. (Appendix A, p. 174). The adjudication entered by the Judge is not a "conviction", nor does it impose the usual civil disabilities inherent in a criminal conviction upon the child. The title of the case does not disclose the nature of the case. All cases in juvenile court are entitled "In The Interest Of _____, A Child Under Eighteen Years of Age." Section 43-205, R. R. S. 1943.

The background of the juvenile court law in Nebraska can best be gained by a study of the juvenile system as we now have it, from the cases with reference to juveniles and the inherent authority of courts. The Nebraska Supreme Court in 1950 said in *Application of Reed*, 152 Neb. 819, 43 N. W. 2d 161 at pages 823 and 826:

"* * * *

"* * * The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless * * *. For this, the residence of the child suffices though the domicile be elsewhere * * *

"The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the State suffices even though the domicile may be in another jurisdiction." * * *

"* * * * *"

In the case of *State* v. *Blanco*, 177 Neb. 149, 128 N. W. 2d 615, at page 153, the court discussed the matter of *parens patriae* as a vehicle for the jurisdiction of the state with reference to minors, in the following words in 1964:

"* * * * *

"* * * We do not doubt that the parents or legal custodian of minor children have a constitutional right to guide and control the care, education, religious training, and the other normal attributes of custodial responsibility. But, there is nothing in any of plaintiff's authorities that invades or abridges the power of the state under the doctrine of parens patriae to scrutinize all of the circumstances surrounding the care and upbringing of children and, under applicable rules, to determine where the custody and control of a child shall be. All of the cases cited hereinbefore support and establish this general principle. * * *

"* * * * *"

In the 1959 case of *In re Sanders*, 168 Neb. 458, 96 N. W. 2d 218, the court said at page 462:

* * * * *

"The Juvenile Court Act did not provide a new court. It only imposed additional powers on the district courts of the state. It did not change the rules or procedure of hearings without a jury of issues of fact. Copley v. Godden, *supra*, declares (158 Neb. 246, 63 N. W. 2d 153): 'The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of contested issues of fact in that court.' The duties imposed by the Juvenile Court Act on the district court are judicial. The validity of the act depends on that. The Legislature may not delegate to the courts the performance of non-judicial duties. Art. II section 1, Constitution of Nebraska; Searle vs. Yensen, 118 Neb. 335, 226 N. W. 464, 69 A. L. R. 257; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397; Laverty v. Cochran, 132 Neb. 118, 271 N. W. 351."

* * * * * * (Parenthetical phrase supplied.)

In the recent case decided in 1966 of *In re McCauley*, 178 Neb. 412, 133 N. W. 2d 921, the court discussed the matter of the obligation of the state with reference to the Juvenile Court Act, at pages 417 and 418 in the following words:

* * * * *

"* * * When we are dealing with this phase of the juvenile court act, we must not overlook the fact that the act had its origin in the protection that is due the innocent or helpless. Jones v. State, 175 Neb. 711, 123 N. W. 2d 653. It was never intended that the method provided for its operation should be a trap to prevent such protection. If

it can possibly be avoided, this court should not adopt a construction which would have that effect.

"The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficent purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms. As was said in State ex rel Miller v. Bryant, 94 Neb. 754, 144 N. W. 804, the juvenile court law did not create a new court, it merely gave a court with general common law equity jurisdiction new and additional powers. * * *

* * * * * *

As long ago as 1922, this court stated in the case of *Laurie v. State*, 108 Neb. 239, 188 N. W. 110, beginning at page 242:

* * * * * *

"* * * A commitment to the industrial school upon such a charge is not a conviction of a crime or a commitment to a penal institution. This question of a right of trial by jury was before the Supreme Court of Wisconsin in *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, * * *

"The commitment of a child to an industrial school is not a punishment for crime, but to furnish the child needed guardianship, maintenance, and care for its benefit and that of society, is not an interference with personal liberty requiring a trial by jury to justify it."

Judge Marshall in discussing the question of the right of a trial by jury and the object and purposes of the law, says in his opinion:

"The proceeding is not one according to the course of the common law in which the right of

trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever—but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint for imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. * * *

Nebraska law has for years been ahead of other States in affording due process in the area of juvenile proceedings and it has kept pace with recent decisions such as *In re Gault, supra*. Section 43-205.08, (Appendix A, p. 17). Will a jury trial in juvenile court give us a "more perfect" justice or will it only further clutter the already overcrowded court calendar and tear the very essence from the juvenile court system.

In the trial of criminal cases, it is obvious from the following tables that by the slightest concerted effort

defense attorneys by the simple device of merely insisting upon a jury trial could throw the administration of criminal justice in this country into chaos. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, page 9, sets forth the following:

"* * * * *

"The question of guilt or innocence is not contested in the overwhelming majority of criminal cases. A recent estimate is that guilty pleas account for 90 percent of all convictions; and perhaps as high as 95 percent of misdemeanor convictions. But the Commission has found it difficult to calculate with any degree of certainty the percentage of cases disposed of by guilty plea, since reliable statistical information is limited. Clearly it is very high. The following statistics indicate the number and percentage of guilty plea convictions in trial courts of general jurisdiction in States in which such information was available.

State (1964 statistics unless otherwise indicated)	Total convictions	Guilty Pleas	
		Number	Percent of total
California (1965)	30,840	22,817	74.0
Connecticut	1,596	1,494	93.9
District of Columbia (year ending June 30, 1964)	1,115	817	73.3
Hawaii	393	360	91.5
Illinois	5,591	4,768	85.2
Kansas	3,025	2,727	90.2
Massachusetts (1963)	7,790	6,642	85.2
Minnesota (1965)	1,567	1,437	91.7
New York	17,249	16,464	95.5
Pennsylvania (1960)	25,632	17,108	66.8
U.S. District Courts	29,170	26,273	90.2
Average [excluding Pennsylvania]			87.0

"* * * * *"

It takes no imagination to prophesy that the increase in percentage of jury trials could easily delay a case for several years, which in the case of growing children whose personalities and learning change daily, is much

more critical than in the case of adults. Assuming the courts can be of assistance to the child, the delay would be so great that it would in many cases be too late to help.

The Honorable Morris Miller, Chief Judge of the Juvenile Court of the District of Columbia, testifying before the United States Senate Committee on Appropriations Subcommittee on the District of Columbia on May 7, 1969 (according to the uncorrected transcript—the corrected not yet being available) pointed out the following circumstances in his court where jury trials are available:

"* * * * *

"This is our quarterly report that just came out and it covers January, February, and March of 1969. It compares the referrals for delinquency to the Juvenile Court with a similar quarter, that is, the preceding 3-month period of October, November, and December of 1968. Although the total increase is 3 percent, it conceals the actual seriousness of some of those offenses.

"Although the actual overall increase is 3 percent, the actual increase in serious crimes of violence is 15 percent.

"Senator Proxmire. Among juveniles?

"Judge Miller. Yes, sir.

"* * * * *." (P. 620)

"* * * * *

"Senator Proxmire. All right.

"Let me ask you, what is the Juvenile Court's present backlog?

"Judge Miller. The total backlog on juvenile cases is 2,775. On the adult cases, 606. Total backlog, 3,381.

"Senator Proxmire. What does this mean in terms of time?

"Judge Miller. Well, it depends on what the particular posture of the case is.

"Senator Proxmire. For example, I have a letter here from you, on April 18, D. C. Budget Officer, in which you say in part the Court has two jury days per week scheduling 16 jury cases for these two days.

" 'I testified that two full days a week are allocated by the Juvenile Court to jury trials. At that rate, assuming the unlikely event there would be no more requests for jury trials, it would take 2½ years just to dispose of the jury trials pending.'

"Judge Miller. That is right.

"Senator Proxmire. Does this mean that you have a backlog of 2½ years?

"Judge Miller. Again, I must say it depends on what posture you are talking about. If you are talking about jury trials, yes.

"Senator Proxmire. I am reading your letter and I want an explanation.

"Judge Miller. That is just talking about jury trials.

"Senator Proxmire. That is what I want.

"Judge Miller. It is bigger now.

"Senator Proxmire. It is more than 2½ years?

"Judge Miller. I would say it is closer to 6 years.

"Senator Proxmire. Six years?

"Judge Miller. There were 242 juveniles awaiting jury trial as of March 31, 1969.

"Senator Proxmire. It is closer to 6 years; what do you mean it is closer to 6 years?

"Judge Miller. Because you cannot have more than 40 jury trials a year.

"Senator Proxmire. I see. So you say you have 240 pending and therefore it is 6 years?

"Judge Miller. That is right.

"But I do not want you to believe that we are going to wait all that length of time.

"Senator Proxmire. I want to be reassured. What are you going to do about it?

"Judge Miller. Well, that 242 is going to be decreased as cases are calendered and the same juvenile may be in the Court's jurisdiction on another offense, so that the jury calendar, that jury trial, will be canceled. Many of those cases are going to be dismissed because of the inordinate length of time from the time of denial to the time of jury trial and the Government is not able to produce its witnesses.

"Complainants are not available.

"Senator Montoya. Mr. Chairman, may I interject here?

"Senator Proxmire. Yes.

"Senator Montoya. Do I understand you to say that you can only have about 40 jury trials a year?

"Judge Miller. Of juveniles.

"Senator Montoya. Yes, of juveniles.

"Judge Miller. Yes.

"Senator Montoya. How many juvenile Judges do you have?

"Judge Miller. Three.

"Senator Montoya. And this is all the allocation that you have made?

"Judge Miller. We have two jury trials a week, one for juveniles and one for adults.

"Senator Proxmire. That is one a week, roughly, a little less than one a week of juveniles.

"Judge Miller. We have, of course, on the other day of the week, we have the adults' trials.

"Senator Proxmire. It is beyond me. I am new to this chairmanship of this Committee; Joe is a lawyer, I am not a lawyer, and he is perhaps more familiar with this. But it baffles me how you can have a backlog of 240 cases and try 40 a year and not have gross injustice, the situation where you have people waiting for a jury trial not for months, but literally for years.

"Judge Miller. But, Senator, this is not the first time this has been mentioned. I have been asking for more Judges for this purpose for years.

"Senator Proxmire. I do not say it is the first time it has been mentioned. I am just wondering what you feel we can and should do about it. What are you asking for here that is going to enable you to cut down on this backlog, substantially, make real inroads?

"Judge Miller. On the jury trials, nothing.

"Senator Proxmire. Do you not think you should? Do you not have the responsibility to do so?

"Judge Miller. The only answer is more Judges, and that is not in our budget here.

"* * * * *." (pp. 633 to 639)

(Note: It should be emphasized that besides the 242 juvenile jury case backlog, the court had a 2,533 non-jury juvenile backlog according to the judge's testimony, supra.)

"* * * * *."

"Senator Proxmire. Just briefly then, tell me what are the consequences as far as the person who is awaiting trial, the juvenile awaiting trial. If he has to wait for years, what happens to him.

"Judge Miller. Well, the rate of repeating is so great, that in at least a third of these cases he is going to be apprehended on another offense while he is waiting.

"Senator Proxmire. Does this mean it is impossible to have any effective correctional action during this period?

"Judge Miller. No, sir.

"Senator Proxmire. Well, it is not possible to have the same kind of effective preventive action or corrective action; is that correct?

"Judge Miller. I agree with you. I do not think it is possible.

"But, you must understand, Senator, this is a relatively recent development. When I went on the bench in October of 1962, there were two juvenile jury cases awaiting trial. Today there are 242.

"Senator Proxmire. What is the reason for that?

"Judge Miller. The reason for that is that we have emphasized the need for lawyers.

"Senator Proxmire. They are asking for jury trial?

"Judge Miller. They are denying and asking for jury trials. The rate of denials is much higher than it has ever been compared to the rate of acknowledgements as it used to be.

"Senator Proxmire. Is 40 a year about the best base you have, have you done better than that in the past at any time?

"Judge Miller. I am just averaging the number of jury days that are available, and there seems to me to be about 40.

"Senator Proxmire. This has been the practice?

"Judge Miller. Yes.

"Senator Proxmire. How does this compare with other cities; do you have any idea?

"Judge Miller. I do not know that other cities, except for maybe one or two, have jury trials for juveniles.

"* * * * *." (pp. 640 to 642)

The Supreme Court of the United States in *Application of Gault*, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, in striking down Arizona procedural processes stated that they were a violation of "the essentials of due process and fair treatment." The four items of due process touched upon by the court were:

1. Notice of charges.
2. Right to counsel.
3. Confrontation, self-incrimination, cross examination.
4. Appellate review and transcript of proceedings.

These procedures are, and have been, followed by the Nebraska courts for years.

In the case of *In Re Roth*, 158 Neb. 789, 64 N. W. 2d 799, the Nebraska Supreme Court set out the necessity for notice of charges as follows:

"* * * * *.

"* * *. The purpose of the requirement clearly is to apprise the parent or custodian timely of a charge against the child and to afford a reasonable opportunity to safeguard his rights, interests, and liberty.

"Without that protection a child of tender years could well become the victim of the merciless and be deprived of the constitutional and traditional safeguards which are guaranteed to even socie-

ty's most depraved adult. Such a situation would be intolerable. See, Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308; Ripley v. Godden, *ante* p. 246, 63 N. W. 2d 151.

"* * * * *."

As to the minor's right with reference to confrontation, self-incrimination and cross examination, the Nebraska Supreme Court has repeatedly and emphatically required that the boundaries of due process be respected. In the case of *In re Sanders,* 168 Neb. 458, 96 N. W. 2d 218, the Nebraska Supreme Court stated as follows:

"* * * * *.

"The rules of evidence are applicable to a hearing of a charge made under the Juvenile Court Act and they must be substantially observed. It is only legal evidence which can establish a charge under the act or sustain a judgment rendered in the proceeding involving the charge. It has been previously said and is now affirmed that in a hearing before the Juvenile Court the customary rules of evidence must be adhered to and a finding of fact may not rest on or be sustained by hearsay or unsworn statements; that the essential processes, rules, and procedures of the law established and observed to guide and aid courts in the trial and decision of issues of fact are applicable to proceedings under the Juvenile Court Act and they are not permitted to be disregarded because the act refers to such a proceeding as a summary one; and that an issue of fact in such a proceeding must be heard and determined by observance of the rules of evidence that are considered essential and appropriate to ascertain the truth and to protect substantial rights in hearings had without a jury for the adjudication of issues of fact of civil cases in the district court. Krell v. Mantell, *supra*; Ripley v. Godden, *supra*; State ex rel. Fitzgerald v. Barkus,

ante p. 257, 95 N. W. 2d 674; Annotation, 43 A. L. R. 2d 1141.

"* * * * *."

In the case of *In Re Mantell,* 157 Neb. 900, 62 N. W. 2d 308, the Nebraska Supreme Court quoted with approval from a New York State case as follows:

"* * * * *.

"* * *. The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules. Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, the hopes and fears of social workers, are all sources of error and have no more place in Children's Courts than in any other court.

"* * * * *."

The matter of appellate review and transcript of proceedings has always been respected in Nebraska. The County Court and the District Court have concurrent jurisdiction, both courts being courts of record, and procedure for appeal from County Court to District Court and from District Court to the Supreme Court of Nebraska are all provided by statute. The Nebraska Supreme Court in 1959, in the case of *In re Sanders, supra,* stated as follows:

"* * * * *.

"This is a special statutory proceeding. The adjudication made herein by the trial court is reviewable in this court by appeal. Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122; Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. The manner of disposing of such an appeal in this court is by trial de novo. See, Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823;

Rhoades v. State Real Estate Commission, 152 Neb. 701, 42 N. W. 2d 610.

"* * * * *"

The Supreme Court of the United States, in the case of *In Re Gault, supra,* did not, by any stretch of the imagination, indicate that juveniles were to be tried exactly as criminal adults, but they recognized that children are different from adults. The court said:

"* * * * *.

"* * *. 'We do not mean * * * to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.

"* * * * *."

The *Gault* case goes on to say that the "condition of being a boy does not justify a Kangaroo Court." The court does not then say one word about requiring a jury trial for a juvenile delinquency hearing. The court does, however, go on to say:

"* * * * *.

"* * *. 'Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.'

"* * * * *."

It is difficult to see how the "loose procedures" could be corrected or in any way changed by the addition of a

jury trial in Juvenile Court. It is difficult to see how "high-handed methods", or "Kangaroo Courts", could be corrected by the introduction of a jury trial into the Juvenile Court procedure. It is also difficult to see how "crowded court calendars" could be alleviated by the introduction of a jury trial into Juvenile Court procedure. Quite the contrary is true. "Crowded court calendars" would become even more crowded with advent of jury trial into Juvenile Court procedure. "High-handed methods" and "Kangaroo Courts" can be best checked on by the supervisory courts as can "loose procedures" which may occur in Juvenile Court. The addition of a jury trial in the Juvenile Court would correct none of these evils.

This Court in *Gault* set forth in detail and quoted frequently from the recommendations of The President's Commission on Law Enforcement and Administration of Justice "The Challenge of Crime in a Free Society". *Re Gault*, 387 U. S. 1 at 38. It is of particular importance to note that of the recommendations set forth by the National Crime Commission Report the right to a jury trial in juvenile court and to be proven guilty beyond a reasonable doubt are conspicuously absent. On the other hand the recommendations set forth by the Commission and the actual holding of *Re Gault* are carefully complied with in Nebraska Juvenile Court Law, Sections 43-201, et seq. (Appendix A).

In the Task Force Report: "Juvenile Delinquency and Youth Crime", p. 38, The President's Commission on Law Enforcement and Administration of Justice enlarges upon the report set forth in "The Challenge of Crime in a Free Society", and states as to jury trials:

"*Trial by Jury*

"Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.

"As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge.' The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties. Moreover, the presence of a jury affects the whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect, and emotion rather than a more businesslike presentation.

"A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.*, incorrigibility, need for care and supervision,

truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

"As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. 'This too might be lost, and justice still be done.' "

Other authoritative persons who have deeply studied this question have arrived at the same conclusion. In the latest draft of the "Uniform Juvenile Court Act", drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states at its Annual Conference, July 22—August 1, 1968, which was approved by the American Bar Association at its meeting at Philadelphia, Pennsylvania, August 7, 1968, it provides in this regard, Section 24, page 20:

"(a) Hearings under this Act shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 3.

"* * * * * *"

A distinguished group of judges throughout the nation intimately conversant with the problems of crime and delinquency has recently gone on record as favoring adjudicatory hearings without a jury in juvenile courts. In "Model Rules for Juvenile Courts" adopted by the Council of Judges of the National Council on Crime and Delinquency 1969, while not specifically so stating, it is clear from the rules that no jury is con-

templated. Rule 23, page 49, and Rule 24, page 51, together with the comments thereon, are as follows:

"Rule 23. Order of Proceedings

"The court shall begin the hearing by determining whether all parties are present and whether lawful notice of the hearing has been given, and it shall require that these facts be of record. It shall then inform the parties of the substance of the petition.

"Before taking testimony, the court shall explain to the child and his parents their rights as set forth in Rules 38 and 39 and shall assign counsel if required by Rule 39.

"When the court has explained to the child the meaning of the right to remain silent and finds that he adequately understands this right, it may inquire of the child in a case brought under [section of juvenile court ~~law~~ dealing with jurisdiction because of the child's violation of law or of a required standard of behavior] whether he admits or denies all or some of the allegations in the petition. Failure or refusal of the child to admit the allegations shall be deemed a denial of them.

"If any or all of the allegations of the petition admitted by the child are sufficient to give the court jurisdiction, the court may take testimony to corroborate the admission or may proceed directly to the adjudication."

"Comment

"In all cases in which a child's behavior is at issue, the child and his parents should be present at the start of the hearing. See Rule 36. If an adult party cannot be found or refuses to appear at the hearing, the court shall either appoint a guardian *ad litem* for the child, as provided in section 15 of the Standard Acts, or shall appoint an attorney for the child. An attorney should be appointed, if necessary, to represent the absent parties.

"Although the parties have been notified before the hearing of their right to counsel, the court must make an independent inquiry into the question of representation if they appear without counsel. Section 19 of the Standard Acts requires the court to inform the child and his parents of their right to counsel, and this requirement cannot be delegated to an intake officer. Unless representation by counsel is competently and intelligently waived, as provided in Rule 39, the court must assign counsel before the hearing can proceed.

"If the child understands his rights, it is appropriate that he 'plead' to the allegations. Such a procedure is provided in the Supreme Court of Alaska's Rules of Juvenile Procedure, R. 12(e)(4), and is adopted here. In the vast majority of juvenile court cases, the child admits the allegations of the petition, and the admission may obviate the necessity for a full hearing. The court may, of course, call witnesses to corroborate any admissions.

"Judge Luther W. Maples, of the Harrison County Court, Gulfport, Miss., disagrees with paragraph two of this rule, and states:

"It is not the duty of a civil court to advise litigants that they are entitled to an attorney or that they do not have to make a statement admitting the allegations contained in the declaration, bill of complaint, or allegations in the interest of the child. This is not to say that a litigant has no right to be represented by an attorney, that a litigant has no right to be heard before the court, or that the court should not be interested in obtaining the truth in any case. However, when a litigant is advised that he does not have to answer any question, that he has the right to remain silent, and that he has the right to an attorney, a criminal hearing is created."

"Rule 24. Preparation and Presentation of Evidence

"If the allegations of the petition are in issue, whether the testimony shall be elicited by the court or by a civil legal officer of the state or a subdivision thereof shall be determined by the court: The court shall base its determination on the complexities inherent in the case."

"Comment

"In most cases, testimony should be elicited by the judge, who can insure the legality of the proceeding while maintaining the informal atmosphere that has traditionally permeated the juvenile court. On occasion, when the court anticipates complex questions of introduction of evidence, it may find it advantageous for the state's case to be elicited by an attorney, who can present the proof in appropriate order and control the testimony that will be given.

"The prosecutorial atmosphere of criminal trials should have no place in juvenile courts. The purpose of the hearing is the elicitation of facts, avoiding the urge to obtain convictions prevalent in criminal courts. Prosecutorial techniques should therefore be avoided; if it is necessary for the facts to be elicited by an attorney, he should not be a member of the prosecutor's office.

"The eliciting of testimony by a probation officer, untutored in the law, is not conducive to an orderly hearing and tends to undermine the child's faith in the impartiality of the probation staff, which may be called upon after disposition to work with the child. If the probation officer is in possession of facts related to the acts alleged in the petition, his role at the adjudicatory stage is only that of a witness.

"Some members of the Council of Judges and the National Council of Juvenile Court Judges maintain that in any contested juvenile case, the testimony cannot be successfully elicited by the court and that it should be elicited by a civil legal officer. They hold that the same objections to presen-

tation of the case by the probation officer apply to its presentation by the court and that, in addition, a judge cannot listen to the testimony and observe the reactions of the parties while he frames questions to be posed to a witness."

The Supreme Court of Pennsylvania in a case decided since the *Gault* case, *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 234 A.2d 9, the court made the following observation with reference to delinquency proceedings:

"* * * * *.

"* * *: 'The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective, —aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as parens patriae.' * * *.

"* * * * *."

In a footnote to this Pennsylvania case, the following observation is made:

"Certainly implicit in *Gault,* is that procedural safeguards alone are no panacea. The institution of these safeguards in court proceedings will not arrest juvenile delinquency unless its root causes are also attacked."

The court then summarized the view of what they felt juvenile courts should be, as follows:

"* * * * *.

"The Supreme Court's opinion should not be viewed by the Courts or Judges of this Commonwealth as a mandate to abandon the juvenile court

> adjudicative procedure. Rather, it is an invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds. The Supreme Court, in our view, recognized that there are essential differences between the trial of adults and juveniles. Similarly, juvenile court judges must recognize these differences and exercise their discretionary powers, if the aims or purposes of the juvenile court are to be achieved.
>
> "* * * * *"

and the court further set out the reasons why it is imperative that the juvenile court, as such, remain flexible within the framework of due process at page 16 of 234 A. 2d, in the following words:

> "* * * * *
>
> "During the actual court hearing, the juvenile court judge, after weighing the serious nature of the crime, the age of the child and the possibility of incarceration, must exercise his broad discretionary powers which allow him to employ techniques designed to serve the best interests of the child. He need not apply the same procedure for the incorrigible and the rapist, for the ten year old charged with larceny of a bicycle and the seventeen year old charged with armed robbery. He must be prepared to order further studies or testimony, in satisfying himself that he has sufficiently delved into all aspects of the case.
>
> "* * * * *"

Estes v. *Superior Court*, 73 Wash. 2d 272, 438 P. 2d 205, which was also decided since the *Gault* case, decided that a jury trial for a juvenile is not a requisite of due process and so stated as follows:

> "* * * * *

"We do not believe that the Supreme Court's opinion in *Gault*, supra, is to be considered as a mandate to abandon this beneficial concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury.

"* * * * *."

Just exactly how does the jury trial fit into a system of justice. Courts of equity always sit without a jury. The Supreme Court of the United States in the case of *Jackson* v. *Denno*, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, in discussing the reason for requiring that a Judge first pass upon a confession before a jury hears it, discusses shortcomings of juries as follows:

"* * * * *.

"* * *, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?

"* * * * *."

In *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86

L. Ed. 1595, in discussing jury trials and Maryland's practice of having defendant waive a trial by jury, the court said:

"* * * * *.

"* * *. Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved.

"* * * * *."

The case of *Duncan* v. *State of Louisiana*, 391 U. S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444, is a criminal prosecution against the defendant. This case is a non-criminal type proceeding not in existence at common law upon which the constitutional right to jury is based. Further in *Duncan*, the Court recognized the ability to get a fair trial to a court, stating at 391 U. S. 158:

"* * * * *.

"* * *. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. * * *.

"* * * * *."

The case of *Bloom* v. *State of Illinois*, 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477, is a case of criminal contempt of court proceedings which deals with the actions of an adult. As this court stated at 391 U. S. 201:

"* * * * *.

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. * * *.

"* * *. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. * * *.

"* * * * *."

In Mr. Justice Harlan's dissent in the case of *Miranda* v. *Arizona*, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, at page 526, Mr. Justice Harlan set out the following quotation from Mr. Justice Jackson with reference to the court's "interpretation" of the Federal Constitution:

"* * *: 'This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.'"

Indeed will not the adding of a jury trial into the juvenile court be adding one too many stories to the temple of constitutional law?

While proponents of a jury trial frequently state that the fact that a child may be "incarcerated" until age twenty-one ipso facto make delinquency a "serious offense" within *Duncan* and *Bloom*, they ignore the fact that in many cases the training school or other institution in which the child is placed is frequently better than their own home, the military school or even common school in which many children are placed by their own parents or required to attend by state law; they are far superior to many of the so-called feeble-minded institutions in which children are incarcerated without a jury. Children are under a legal disability

in much the same way as mentally retarded, mentally ill, and aged individuals. Any case of institutionalizing by persons in authority (or even by certain relatives) whether it be because of senility, mental retardation, delinquency, dependency, feeble-mindedness or other reason, could be called "incarceration" and the same due process requirements apply. As demonstrated by the Nebraska case law and statutes set forth herein the State of Nebraska has gone a long way in the case of juvenile court proceedings in providing notice, serving a copy of the complaint, counsel, rules of evidence, et cetera. With these protections available the historical arguments for a jury expressed in *Duncan* v. *Louisiana, supra*, to avoid oppressiveness, et cetera, would not seem to be valid. (The juvenile is certainly much more protected than in the other forms of "incarceration" listed above.) Of course, in any determination of the status of an individual the fact-finding procedure is of utmost importance. It is generally conceded, as it was in *Duncan* v. *Louisiana, supra*, that courts, without juries, are capable of having an adequate fact-finding process. In the case of children, the problems of publicity and the difficulty of providing a jury "of their peers" further emphasizes the suitability of trial to the court. The Honorable Lindsay G. Arthur, Vice President of the National Juvenile Court Judges Association, in an excellent article exemplifying some of the practical problems peculiar to juvenile trials stated in this regard:

> "D. Public Trial?
>
> "Anyone who enjoys seeing his name in print as a lawbreaker is a potential criminal, and the sooner he's put away the better.
>
> * * *
>
> "Publicity is painful but necessary. Most people have good youngsters they want to keep away

from the hoodlums. How can they do it if they don't know who the hoodlums are?

* * *

"Giving publicity to a delinquent doesn't destroy him. In all cases I have seen it has improved his behavior.

Judge Lester Loble[30]

(30. *Montana's Experiment with Juvenile Crime*, Vol. 75, No. 6 AMERICAN LEGION MAGAZINE 50 (1963).)

"In one short year . . . in the court presided over by (Judge Lester Loble) there has been a 58 per per cent increase . . . in juvenile felony cases. . . .[31]

(31. *Open Hearings in Juvenile Courts in Montana*, Statement by the National Council on Crime and Delinquency (Nov. 1964).)

"'Publicizing a juvenile delinquent brands him—and his brothers and sisters—and isolates him into the company of other delinquents, with little preventative effect. But, not publicizing delinquency proceedings threatens both the child and the public that their proper interests will be arbitrarily handled—or ignored. Traditionally the adult courts have accepted the public's 'right to know' as a needed protection both to the accused and the victim, and upon an unproven belief that punishment is a deterrent to others. In their brief history of only some seven decades, the juvenile courts have accepted the child's 'right to privacy' as a more needed protection from public retribution. There are five principal influences attributed to public trial. First, it protects the accused from an arbitrary court. But a lawyer, a court reporter, and an appellate court can provide better protection. Second, it assures the victim that an eye has been given for his eye. But the *lex talionis* has been repealed. Third, it deters others from criminal conduct by fear of known punishment. But there is better authority to the effect that the real deterrent is the fear of getting caught. Fourth, it drives the guilty into further crime by isolating

them into a criminal environment, publicity's real fault. Fifth, it protects the public from judicial disregard of dangerous conduct, publicity's real value. A simple rule which protects the public without needless harm to the accused, and without duly restricting freedom of the press requires that: *news media should be accorded full access to juvenile court proceedings, but should be forbidden to identify any participating juvenile.*

"E. Jury Trial?

"A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact-finding process than trial before a judge.

"A jury of peers is a protection to both the public and the individual from authority and judicial whim. Peers have a degree of sympathy, they can relate to the accused and understand in some measure his idiom and his world. But children are children's peers, and children can't be tried by a jury of children. Yet adults can't understand long hair, and teeny-bop talk, and the driving fear of being left out, and the perplexing problem of identity for a changing body with a changing mind in a changing world. Adults can be taken in by giving a hoodlum a suit, a tie, and a crew cut, and adults can be put out by the normal rebellion of children striving for independence. Possibly judges who are in constant touch with juveniles come closest to being their peers—if empathy is peerage. And in a court of equity, from which the juvenile courts have evolved, it was thought that: *where remedies were needed beyond law's rigidities, justice can better come from judges than from juries.*" (Footnotes supplied in parenthesis.) (Vol. 45, No. 2, North Dakota Law Review, Winter 1969, "Should Children Be As Equal As People?", p. 204, at 213-215.)

Apparently, appellant in the present case was satisfied with the fact-finding procedure and the determi-

nation of facts made by the County Court of Dodge County, Nebraska, inasmuch as he failed to appeal therefrom but instead instituted this case in habeas corpus. Had the appellant chosen to appeal from the County Court hearing, under Nebraska law, he would have received a trial de novo of the facts by a judge of the District Court and a trial de novo of the facts on the record by seven judges of the Nebraska Supreme Court. Section 25-1937, R. R. S. Nebraska 1943, *Krell* v. *Mantell*, 157 Neb. 900. Here again, the Nebraska procedure stands out as a judicial as opposed to a social type court procedure which exemplifies the careful protection given to a juvenile which eliminates the need for the intercession of a jury to shield him from the oppression of the state.

In balancing the pros and cons surely the delay and consequent damage which would result, to a child whose personality is daily changing, by providing jury trials outweighs any benefit to be gained from a jury trial, especially in view of the many safeguards in the Nebraska judicial system.

In a comment to Section 24 of the Uniform Juvenile Court Act, *supra*, the Commissioners stated in regard to public trials, at page 20 thereof:

"* * * * *

"There has been some recent tendency to permit publicity to juvenile court proceedings, on the theory that this will act as a curb to juvenile delinquency. There is little evidence to support this theory and considerable indication that it affords the hard core delinquent the kind of recognition he wants. On the other hand, the harm it causes may be great in the case of the repentant offender.

"The section as drawn permits the court in its

discretion to admit news reporters. This is frequently done with the understanding that the identity of the cases observed will not be published, a procedure generally satisfactory to the news media.

"* * * * * *"

II.

Constitutional Due Process of Law Does Not Require a Certain Measure of Proof in a Juvenile Proceedings, Other Than Due Process Would Require For Any Civil Proceedings.

Proof beyond a reasonable doubt has always been an accepted measure of proof in a criminal prosecution. Delinquency is not a criminal prosecution. As stated in *Binkley* v. *State*, 34 Neb. 757, 52 N. W. 708:

"* * * * *

"* * *. It is a serious matter, not only to a party, but to the state as well, to take a person from the ordinary avocations of life, brand him as a felon and deprive him of his liberty, appropriate his labor and cast a cloud upon his future life and humiliate his relatives and friends; and to authorize the state in doing this there should be no reasonable doubt of his guilt. * * *.

"* * * * * *"

Delinquency does not brand the youth a felon, and does not carry the implications or the disabilities that conviction for a felony carries. When a person under the age of eighteen years sets into action a series of events which lead to a violation of a State Statute, he can be dealt with in one of two ways. He can be treated as a person in need of aid and assistance by taking him to the Juvenile Court, or his actions can be treated as criminal conduct and he can be placed on

criminal trial to answer criminally for this conduct and there have a determination made upon the criminal standards as set out by the Constitution.

Other jurisdictions have held that proof by a preponderance of the evidence is sufficient. In the case of *In Re Wylie,* 231 A. 2d 81, (the District of Columbia Court of Appeals, 1967), which has been decided since the *Gault* decision, that court held:

"* * * * *.

"Appellant also argues that it was error for the court to charge that the burden on the government to prove the allegations was by a preponderance of the evidence. Appellant says the burden should have been that of beyond a reasonable doubt. The decision in *Gault* alluded to but did not pass upon the question of the degree of burden of proof in Juvenile Court cases (Id. at 11, Note 7). We adhere to our ruling in In re Bigesby, D.C. App., 202 A. 2d 785, 786 (1964), that 'the strictly criminal law concept of guilt beyond a reasonable doubt' is unnecessary and improper in a Juvenile Court proceeding.

"* * * * *."

In Re Agler, 15 Ohio App. 2d 240, 240 N. E. 2d 874, is another case decided since the *Gault* case in which the court held that a preponderance of the evidence is the proper quantum of evidence required in a delinquency hearing.

In the California case, In Re M., 75 Cal. Rptr. 1, 450 Pac. 2d 296, the court concluded that the proper measure of proof is by a preponderance of the evidence as follows:

"* * * * *.

"In California we do not write upon a clean slate.

For the first half-century of their existence our juvenile court statutes contained no provision on this topic, and a wide variety of standards of proof was in actual use. In 1957, however, a special commission was created to survey and evaluate the administration of juvenile justice in this state and submit recommendations for legislative action. After three years of field studies, hearings, drafts, and conferences with experts and practitioners alike, the commission filed its report. On the important issue of procedural rules, the commission *poisted* that 'The problem in attempting to establish acceptable juvenile court procedures is to attain a working balance between two essential objectives—first, preserving the guarantee of due process to the minor; and second, establishing an informal court atmosphere so that potentially harmful effects of the proceedings are minimized and the minor's receptivity to treatment is encouraged.' (Rep. of Governor's Special Study Com. on Juvenile Justice (1960), pt. I, p. 29.) Mindful of both these goals, the commission concluded (at p. 30) that 'All of the reasons for employing rules of evidence in other judicial proceedings, e.g., to insure truthful, reliable, and fair testimony, apply with equal force to a hearing on a minor's delinquency or a hearing in which a child may be removed from his family because of parental neglect. * * * On the other hand, the Commission sees no valid reason for requiring the degree of proof customary in criminal cases. It is our opinion that requiring proof of the jurisdictional facts by a preponderance of evidence will sufficiently safeguard the rights of the minor so long as the court scrupulously observes the presumptions of lawful conduct and circumstance until the allegations are actually proven in open hearing.' Accordingly, the commission recommended that the standard of proof in juvenile court matters be a preponderance of the evidence, and the Legislature so provided. (Stats. 1961, ch. 1616, p. 3482.)

"* * * * *"

The most recent case on the matter of standard of proof required in a juvenile proceeding is the New York case, *In the Matter of Samuel W.*, 24 N. Y. 2d 196, 247 N. E. 2d 253. This was a delinquency charge for stealing $112.00 from a pocketbook. The court discussed the matter of standard of proof as follows:

"* * * * *

"It is not easy to define for the purposes of practical application the tenuous difference between 'beyond a reasonable doubt' as a quantitative or qualitative test of proof, and 'by a fair preponderance of the evidence'. It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a 'higher' standard.

"But the standard is in the present case expressly stated by statute; and, indeed, by a statute which goes very far in providing due process safeguards for children in delinquency proceedings in Family Court. The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision; and, since the proceeding is quite different from a criminal prosecution, it seems reasonable to think there is no substantial equal protection question in the case.

"* * * * *"

The juvenile proceeding being equitable or non-criminal in nature allows a different proof than in a criminal case and likewise has a different consequence than any criminal case. If we are to require that cases of all ages involving a certain set of facts demand certain stereotyped procedures, where, then, is our system of justice. If we force a juvenile to be tried the same as an adult criminal and allow a juvenile a different disposition, are we not then refusing equal

protection of the laws to the adult criminal in that some person, strictly by happenstance of age, is being treated differently than another. If, on the other hand, we are searchong for justice within the "essentials of due process and fair treatment," then we believe the proof by a preponderance of the evidence is a reasonable standard to be used in the proceedings against a juvenile in a Juvenile Court. The Uniform Juvenile Court Act, *supra*, sec. 29(c), p. 24, provides:

> "(c) If the court finds from clear and convincing evidence that the child is deprived or that he is in need of treatment or rehabilitation as a delinquent or unruly child, the court shall proceed immediately or at a postponed hearing to make a proper disposition of the case."

The Council of Judges of the National Council on Crime and Delinquency takes the same position in their "Model Rules for Juvenile Courts," *supra*, Rule 26, p. 57:

> "Rule 26. Standard of Proof
>
> "The facts alleged in the petition shall be proved by clear and convincing evidence."

In discussing the use of evidence, The President's Commission on Law Enforcement and Administration of Justice in "Task Force Report: Juvenile Delinquency and Youth Crime" stated at page 35:

> "* * * * *
>
> "Perhaps the height of the juvenile court's procedural informality is its failure to differentiate clearly between the adjudication hearing, whose purpose is to determine the truth of the allegations in the petition, and the disposition proceeding, at which the juvenile's background is considered in connection with deciding what to do with him. In many juvenile courts the two questions

are dealt with in the same proceeding or are separated only in the minority of cases in which the petition's allegations are at issue. Even where adjudication and disposition are dealt with separately, the social reports, containing material about background and character that might make objective examination of the facts of the case difficult, are often given to the judge before adjudication. .

"To lessen the danger that information relevant only to disposition will color factual questions of involvement and jurisdictional basis for action, the Children's Bureau and others have for some time recommended bifurcating juvenile court hearings into adjudicatory and dispositional proceedings, just as traditionally in the trial of criminal cases there is a sharp division between trial on the issue of guilt and the sentencing determination. Both New York and California have recently adopted this procedure. It makes possible a controlled and relatively narrowly focused inquiry into the facts of the alleged conduct at adjudication and a more general and searching inquiry into factors bearing upon need for supervision at disposition, thus reducing the danger that the limitations of the adjudicatory hearing will unduly narrow the dispositional determination and that the demands of information appropriate to the dispositional hearing will unduly enlarge the scope of the adjudicatory hearing. Under the proposal of the Children's Bureau, for example, 'Findings of fact by the judge of the validity of the allegations in the petition shall be based upon a *preponderance of evidence* admissible under the rules applicable to the *trial of civil causes*,' while '[i]n the disposition part of the hearing any relevant and material information, including that contained in a written report, study or examination, shall be admissible, and may be relied upon to the extent of its probative value.'

* * *

"* * * * * *." (Emphasis supplied.)

This is substantially what the Nebraska Juvenile Court Act has already done—Section 43-206.03(2) and (3).

III.

Whether the Prosecutor's Choice of Juvenile Proceedings, or Criminal Proceedings in a Case Involving a Juvenile, Violates the Fourteenth Amendment of the United States Constitution.

The reasoning of the appellant takes a rather circuitous route in arriving at his conclusion. The case of *Lane* v. *Brown*, 372 U. S. 477, pertains to indigence and stems from the problems caused by overcrowded court calendars as a result of overworked public defenders. The case simply says that even an indigent should have a choice of attorneys and the fact that the public prosecutor does not agree with him should not bar his right of appeal. *Lane* v. *Brown* has no application here.

In order to have effective justice in law, it is necessary to place at least a certain amount of trust in the public officials who have taken an oath to properly and faithfully administer their duties.

Beginning a proposition with a presumption that all prosecutors are enforcing laws according to their whims and not what is in the best interest of the public, whom they serve, is a damning indictment of prosecutors and one which we do not feel they deserve. Who is in a better position to decide in which court the complaint shall be filed. If we set up some other agency for making this determination, the prosecutor still must determine whether or not to take the matter to the agency. Trust and confidence must be placed in someone somewhere along the line, be it the prosecutor, the determining agency, the Juvenile Court, the State Su-

preme Court, or the United States Supreme Court. Every step further that the decision, which court the complaint shall be filed in, is removed from the prosecutor, amounts to a delay. The further the removal, the longer the delay.

Delay can be catastrophic in juvenile matters. If a child touches a red hot stove today and two years from now feels the burn, anyone with common sense can see he is going to be absolutely confused or in deeper trouble. Is it due process, as far as a growing and learning child is concerned, to burden him with these delays? Is this fundamental fairness, so far as the learning child is concerned, to remove the penalty so far from the incident that it is difficult for him to understand why it happened; and is society protected in the meantime—the testimony of the Honorable Judge Morris Miller, *supra*, would say not.

The responsibility for deciding which court to file a complaint against a juvenile rests with the prosecutor in the State of Nebraska. In order to give effect to the Nebraska Statute, 43-218, R. R. S. 1943, which states that the care, custody and discipline of the delinquent child "shall approximate, as nearly as may be, that which would be given by its parents", disposition must also approximate, as nearly as possible, parental disposition of any matter. Due process, so far as the child is concerned, requires that the prosecutor make a speedy decision and obtain a speedy disposition of the matter in the interest of any juvenile.

It is so well established throughout the world wherever our form of jurisprudence is followed as to need no citation of authority that a prosecutor may file a lesser or different charges when a certain set of circumstances constitutes more than one crime of varying de-

grees or gravity. Certainly no one would claim that a defendant's constitutional rights were violated, for example, where a prosecuting attorney filed simple assault amounting to a misdemeanor of such a nature as not to constitute a "serious offense" against a person who had shot another individual with a firearm which could also constitute assault with a deadly weapon or a felony charge.

Every day prosecuting attorneys throughout the world have to make the decision whether to file a felony, a misdemeanor, or nothing at all on every suspect brought to them. Certainly no one could ever successfully contend that those who were filed upon for a "non-serious offense," thus not entitling them to a jury trial, have had their constitutional rights violated because the serious crime was not filed.

Frequently in the law more than one forum or cause of action is open to the plaintiff which is not necessarily the choice of the defendant.

CONCLUSION

Children are supposed to obey their parents or those standing in their place. Children are not allowed to vote. Children are not allowed to enter into contracts for other than necessaries of life. Children are not allowed to drive cars. Children are not allowed to sit on juries. Children are required to attend school. Children are treated differently by everyone, including courts. The reasons for treating children differently vary from the inabilities of the child, to the need of the child for help. The child needs help and training in his formative years and the due process of law with reference to Juvenile Court actions must be correlated with the need for speedy determinations or the

effectiveness of the Juvenile Court, as an aid to children, is lost. If we are searching for a "perfect justice" for children—neither jury, proof beyond reasonable doubt, nor someone other than the prosecutor deciding which court shall be used, will give us this perfect justice. There can be mistakes made in any system of justice. Under the peculiar circumstances of Juvenile Court proceedings, neither jury, proof beyond reasonable doubt nor someone other than the prosecutor deciding what court shall be used, is required to satisfy due process.

Respectfully submitted,

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APPENDIX "A"

43-201. Juvenile courts; definition of terms. As used in sections 43-201 to 43-220, unless the context otherwise requires:

(1) This act shall be construed as referring exclusively to sections 43-201 to 43-220;

(2) Dependent child shall mean any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

(3) Neglected child shall mean any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child; or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child;

(4) Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance;

(5) A child in need of special supervision shall mean any child under the age of eighteen years (a) who, by reason of being wayward or habitually disobedient, is uncontrolled by his parent, guardian, or custodian; (b) who is habitually truant from school or home; or (c) who deports himself so as to injure or

endanger seriously the morals or health of himself or others; and

(6) Parent shall mean one or both parents.

43-202. Jurisdiction; district and county courts; police judge. The district courts of the several counties in this state, and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this act and concurrent jurisdiction under sections 83-220 to 83-223; the county court in each county shall have concurrent jurisdiction with the district court, but in counties having a population of more than fifty thousand such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county. Where a proceeding has been instituted under this act before any county court, the jurisdiction of this court over such proceedings shall continue until the final disposition thereof; *Provided,* appeal may be had to the district court in the same manner as is provided by law in civil cases. In cities having a population of forty thousand and upward, the police judge thereof shall have jurisdiction under this act concurrent with the county judge, within the limits of such city.

43-204. Judge of juvenile court in counties of more than 50,000; selection; juvenile record. In counties having a population of more than fifty thousand, the judges of the district court, on being inducted into office, shall select one of their number to preside over what shall be termed the juvenile court. The judge so selected shall serve throughout his term, unless the judges choose, in the same manner as the original selection was made, another of their number to so act. The judge of the juvenile court shall hear all cases arising under the provisions of this act, and shall give precedence there-

to. He shall also hear such other cases as may be assigned to him but may transfer such other cases to another judge for hearing or trial. A special courtroom, to be designated as the juvenile courtroom, shall be provided for the hearing of cases arising under the provisions of this act. The finding of the court in such cases shall be entered in a book or books kept especially for the purpose, one of which shall be known as the juvenile record.

43-205. Juvenile court; proceedings; by whom and how instituted; title of proceedings. The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a child in his county who appears to be neglected, dependent, delinquent, or a child in need of special supervision, may file with the clerk of the court having jurisdiction in the matter, a petition in writing, setting forth the facts verified by affidavit. It shall be sufficient if the affidavit is upon information and belief. Such petition and all subsequent proceedings shall be entitled In the Interest of , a Child Under Eighteen Years of Age, inserting the child's name in the blank.

43-205.01. Juvenile courts; child taken into custody without warrant; age limit; grounds; not deemed an arrest. A child under the age of eighteen years may be taken into custody by any officer of the peace without a warrant or order of court (1) when in the presence of the officer the child has violated a state law or municipal ordinance; (2) when a felony has been committed and he has reasonable grounds to believe such child committed it; (3) when such child is seriously endangered in his surroundings, and immediate removal appears to be necessary for his protection; or (4) when there are reasonable grounds to believe that he has run

away from his parent, guardian or custodian. Such taking into custody shall not be deemed an arrest.

43-205.02. Juvenile courts; temporary custody of minor; steps to be taken; alternatives permitted. An officer who takes a minor into temporary custody under the provisions of section 43-205.01, shall immediately take reasonable measures to notify the minor's parent, guardian, custodian, or relative and shall thereafter proceed as follows:

(1) He shall release such minor; or

(2) He shall prepare in duplicate a written notice requiring the minor child to appear before the juvenile court or probation officer of the county in which such minor was taken into custody at a time and place specified in the notice. The notice shall also contain a concise statement of the reasons such minor was taken into custody. He shall deliver one copy of the notice to such minor and require such minor or his parent, guardian, custodian, or relative, or both, to sign a written promise that such signer will appear at the time and place designated in the notice. Upon the execution of the promise to appear, he shall immediately release such minor. He shall, as soon as practicable, file one copy of the notice with the juvenile court or officer appointed by the court for such purpose or the probation officer; or

(3) He shall take such minor without unnecessary delay before the juvenile court or probation officer of the county in which such person was taken into custody and deliver the custody of such minor to the juvenile court or probation officer.

In determining which disposition of the minor he will make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, if such

alternative is compatible with the best interests of the minor and the community.

43-205.03. Juvenile courts; temporary custody of minor; investigation by probation officer; release of child, when. Upon delivery to the juvenile court or probation officer of a minor who has been taken into temporary custody under the provisions of sections 43-205.01 to 43-205.05, the court or probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody. The court may then either (1) immediately release such minor to the custody of his parent, guardian, or responsible relative, or (2) admit such minor to bail by bond in such amount and on such conditions and security as the court, in its sole and exclusive discretion, shall determine. In no case shall the court or probation officer release such a minor if it appears that further detention of such minor is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another or if it appears that such minor is likely to flee the jurisdiction of the court.

43-205.04. Juvenile courts; temporary custody of minors under the age of eighteen; release required within forty-eight hours unless complaint or petition filed; exceptions; violations; penalty. Whenever a minor under the age of eighteen years is detained under the provisions of section 43-205.03, such minor shall be released, within forty-eight hours after having been taken into custody, excluding nonjudicial days, unless within such period of time (1) a petition has been filed alleging that such minor has violated an order of the juvenile court, (2) a petition has been filed pursuant to the provisions of section 43-205, or (3) a criminal complaint against him has been filed in a court of competent juris-

diction, and except when a criminal complaint is filed, an order continuing detention until the adjudication hearing, after a reasonable showing that the necessity for detention still exists, is entered by the juvenile court.

This section shall not apply to a minor who has escaped from a commitment, or to a child who has been taken into custody for his own protection pursuant to subdivision (3) of section 43-205.01, in which latter case the child shall be held for a reasonable time. Any person who knowingly holds a child in detention in violation of any of the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars; or be imprisoned in the county jail for a period not to exceed thirty days.

43-205.05. Juvenile courts; temporary custody of minor; taken before juvenile judge promptly. Unless sooner released, a minor taken into custody under the provisions of sections 43-205.01 to 43-205.05 shall be brought before a judge of the juvenile court for an adjudication hearing as soon as possible after a petition has been filed. If the minor is not brought before a judge of the juvenile court within a reasonable period of time, he shall be released from custody.

43-205.06. Juvenile court; minor under eighteen years; right to counsel; appointment. When any minor under eighteen years of age shall be brought without counsel before a juvenile court within the meaning of Chapter 43, article 2, the judge shall advise such minor and his parents or guardian of their right to retain counsel and shall inquire of such minor and his parent or guardian as to whether they desire to retain counsel. The judge shall inform such minor and his parent or

guardian of their right to counsel at county expense if none of them is able to afford counsel. If the minor or his parent or guardian desire to have counsel appointed for such minor, or the parent or guardian of such minor cannot be located, and the judge ascertains that none of such persons are able to afford an attorney, the judge shall forthwith appoint an attorney to represent such minor for all proceedings before the judge in the juvenile court.

43-205.07. Juvenile court; minor under eighteen years; counsel; fees; allowance. Counsel appointed as provided in section 43-205.06 shall apply to the court before which the proceedings were had for fees for services performed. The court upon hearing the application shall fix reasonable fees. The county board of the county wherein the proceedings were had shall allow the account, bill or claim presented by any attorney for services performed under section 43-205.06 in the amount determined by the court. No such account, bill, or claim shall be allowed by the county board until the amount thereof shall have been determined by the court.

43-206. Juvenile court; issuance of process; summons; subpoena. (1) Upon the filing of the petition, a summons with a copy of the petition attached shall issue requiring the person who has custody of the child or with whom the child may be to appear personally and, unless the court orders otherwise, to bring the child before the court, at the time and place stated.

(2) If the petition alleges that the minor is a delinquent child or a child in need of special supervision, a summons, with a copy of the petition attached, shall also be served on said minor requiring him to appear personally at the time and place stated.

(3) If the person so summoned is other than a parent or guardian of the child, then the parent or guardian or both, if their residence is known, shall also be notified of the pendency of the case and of the time and place appointed; if there is neither a parent nor guardian, or if his or her residence is not known, then some relative, if there be one and his residence is known, shall be so notified; *Provided*, in any case the judge may appoint some suitable person guardian ad litem to act in behalf of the child.

(4) No summons or notice shall be required to be served on any person, except as required by subsection (2) of this section, who shall voluntarily appear before the court and whose appearance is noted on the records thereof.

(5) If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may, by endorsement upon the summons, order the officer serving it to take the child into custody at once.

(6) Subpoena may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

43-206.01. Juvenile court; service of process; manner; time; by whom made. (1) Service of summons shall be made by the delivery of a copy thereof to the person summoned or by leaving one at his usual place of residence.

(2) Notice, when required, shall be given in the following manner:

(a) If the person to be notified resides in the county where the action is pending, by delivery of a copy thereof to the person to be notified or by leaving it at his usual place of residence;

(b) If the person to be notified resides outside or has left the county where the action is pending, by mailing a copy thereof by registered or certified mail to the last-known address of such person; or

(c) If after reasonable inquiry, the whereabouts or an address of the parent, guardian or a relative cannot be ascertained, the court may publish a notice in a newspaper of general circulation in the county in which the proceeding is pending. The published notice shall simply state that a proceeding concerning the child is pending in the court and that an order making an adjudication and disposition will be entered therein. If the names of one or both parents or the guardian are unknown, he or they may be notified as the parent or parents, or guardian of (naming or describing the child) found (stating address or place where the child was found). Such notice shall be published once each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

(3) Personal or residence service shall be effected at least twenty-four hours before the time set for the hearing. Registered or certified mail shall be mailed at least five days before the time of the hearing.

(4) Service of summons, notice or subpoena may be made by any suitable person under the direction of the court.

43-206.02. Juvenile court; failure to appear; warrant; custody of child pending adjudication. If the person summoned or subpoenaed as provided in sections 43-206 to 43-206.04, shall without reasonable cause fail to appear and abide the order of the court or bring the child, he may be proceeded against as in the case of contempt of court. In case the summons cannot be served or the parties served fail to obey the same, and

in any case when it shall be made to appear to the court that such summons would be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of a child, or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as legally may be, the court shall proceed to hear and dispose of the case as provided in section 43-206.03; *Provided*, that the hearing shall not be had until there is before the court the minor when charged under subdivisions (4) and (5) of section 43-201, and in all cases the minor's custodian or person with whom he may be, parent or guardian, or, if they fail to appear, a guardian ad litem.

Pending the adjudication of any case, the child may be retained a reasonable period of time on order of the court in the possession of either the person having the charge of the same or some other suitable person, or may be kept in some suitable place provided by the city or county authorities or given to any proper and accredited charitable institution; *Provided*, the court may order such child examined by a physician, surgeon, psychiatrist or psychologist.

43-206.03. Juvenile court; hearings; adjudication; effect. (1) The hearing as to a child in custody of the probation officer or the court shall be held as soon as possible after the petition is filed, and as to a child not in such custody as soon as practicable after the petition is filed.

(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts.

(3) At the hearing the court shall first consider only

the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child.

(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment.

43-206.04. Juvenile court; files; how kept; certain reports and records not open to inspection without order of court. (1) The juvenile court judge shall keep a minute book in which he shall enter minutes of all proceedings of the court in each case, including appearances, findings, orders, decrees and judgments, and any evidence which he feels it is necessary and proper to record. Juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, certificates or receipts of mailing, minutes of the court, findings, orders, decrees, judgments and motions.

(2) The medical, psychological, psychiatric and social welfare reports and the records of juvenile probation officers as relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court.

43-207. Chief and assistant probation officers; appointment; qualifications; duties; salaries. The judge of the district court having charge of the juvenile docket shall have authority to appoint or designate one or more persons of good character, to serve as probation officers during the pleasure of the court. If two or more are appointed, at least one shall be a woman. They shall receive their actual expenses incurred and salaries to be fixed by the district judge making the appointment, with the approval of the county board, to be paid by the county the same as the salaries and expenses of other county employees are paid. The county judge in counties having a population of fifty thousand inhabitants, or less, may appoint one or more persons to serve as probation officers during the pleasure of the court; such probation officer or officers shall receive salaries to be fixed by the county judge making the appointments with approval of the county board, to be paid as other county officers are paid in such counties; *Provided,* that the county judges of two or more adjoining counties may, by agreement, appoint a juvenile probation officer to serve under the joint direction of the judges so agreeing; such officer shall receive his actual expenses incurred and a salary to be fixed by the appointing judges with approval of the respective county boards, to be paid by the respective counties served in proportions determined by said judges based on the populations of the respective counties. Juvenile probation officers shall be selected with reference to their experience and understanding of prob-

lems of family life and child welfare, juvenile delinquency, and community organization. Such officers shall perform the duties prescribed in this act for probation officers and such other duties as may be required by the judge of the juvenile court. In case a juvenile probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said juvenile probation officer in advance when any child is to be brought before the said court. It shall be the duty of said juvenile probation officer (1) to make such investigations as may be required by the court, (2) to be present in court to represent the interests of the child when the case is heard, (3) to furnish to the court such information and assistance as the judge may require, (4) to take such charge of any child before and after trial as may be directed by the court, and (5) to maintain complete case records on each child assigned to him. The county board shall provide for the payment, out of the general fund, of the actual expenses of the juvenile probation officers incurred in the performance of their duties prescribed by this act or under the order or direction of the court.

43-208. Dependent or neglected children; custody; maintenance; payments for support. When any child under the age of eighteen years shall be adjudicated to be a dependent or neglected child within the meaning of this act, the court may permit such child to remain in its own home subject to supervision or may make an order committing the child to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive it embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children, which association shall have been

accredited as hereinafter provided, (4) care of a suitable family; *Provided*, that under subdivisions (1), (2), (3), or (4) of this section upon a determination by the court that there are no private or other public funds available for the care, custody and maintenance of a child, the court may order a reasonable sum for the care, custody and maintenance of the child to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the child without such payment; or (5) care and custody of the Department of Public Welfare.

43-209. Neglected, dependent or delinquent children; guardianship; adoption; powers of custodian designated by the court; visitation; reports. In any case where the court shall award a child to the care of the Department of Public Welfare, an association, or individual, in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward and be subject to the guarianship of the department, association, or individual to whose care it is committed, which association and Department of Public Welfare shall have authority by and with assent of the court to place such a child in a suitable family home or institution. Such guardianship shall not include the guardianship of any estate of the child. Facts may also be set forth in the original petition, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights. After a petition, a supplemental petition, or motion has been filed, the court shall cause to be endorsed on the summons and notice that the proceeding is one to terminate parental rights, shall set the time and place for the hearing, and shall cause summons and notice, with a copy of the petition, supple-

mental petition, or motion attached, to be given in the same manner as required in other cases before the juvenile court.

The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist:

(1) The parents have abandoned the child for six months or more immediately prior to the filing of the petition;

(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;

(3) The parents, being financially able, have willfully neglected to provide the child with the necessary subsistence, education or other care necessary for his health, morals or welfare or have neglected to pay for such subsistence, education or other care when legal custody of the child is lodged with others and such payment ordered by the court;

(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child;

(5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; or

(6) Following upon a determination of neglect or

dependency, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

When termination of the parent-child relationship is sought under subdivision (5) of this section, the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may, in any other case, appoint a guardian ad litem, as may be deemed necessary or desirable, for any party. The guardian ad litem shall be paid a reasonable fee set by the court and paid from the general fund of the county.

When the parental rights have been so terminated and the care of such child is awarded to the Department of Public Welfare, the department shall have authority to consent to the legal adoption of such child and no other consent shall be required to authorize any court having jurisdiction to enter a legal decree of adoption of such child. When the care of such child is awarded to an individual or association and the parental rights have been terminated by the juvenile court, such individual or association may consent, only when authorized by order of such juvenile court, to the legal adoption of such child and no other consent shall be required to authorize any court having jurisdiction to enter a legal decree of adoption of such child; *Provided*, the Department of Public Welfare, an individual, or an association to whom the care of a child has been committed by a juvenile court prior to July 13, 1967, shall have authority to consent to the legal adoption of such child, without an order terminating parental rights. An order terminating the parent-child relationship shall divest the parent and child of all legal rights, privileges, duties and obligations with respect to each other and the parents shall have no rights of inheritance with respect to such child. The order terminat-

ing parental rights shall be final and may be appealed in the same manner as other final judgments of a juvenile court.

The custodian appointed by a juvenile court shall have charge of the person of the child and the right to make decisions affecting the person of the child, including medical, dental, surgical or psychiatric treatment; *Provided*, consent to a child marrying or joining the armed forces of the United States may be given by a custodian, other than the Department of Public Welfare, with approval of the juvenile court, or by the department, as to children in its custody, without further court authority. The authority of a custodian appointed by a juvenile court shall terminate when the individual under legal custody reaches twenty-one years of age, is legally adopted, or the authority is terminated by order of the juvenile court. When an adoption has been granted by a court of competent jurisdiction as to any such child, such fact shall be reported immediately by such custodian to the juvenile court. If the adoption is denied the jurisdiction over the child shall immediately revert to the court which authorized placement of the child for adoption. Any association or individual receiving the care or custody of any such child, shall be subject to visitation or inspection by the Department of Public Welfare, or any probation officer of such court or any person appointed by the court for such purpose, and the court may at any time require from such association or person a report or reports containing such information or statements as the judge shall deem proper or necessary to be fully advised as to the care, maintenance, moral and physical training of the child, as well as the standing and ability of such association or individual to care for such child. Except where the care of the child is awarded to the Department of Public Welfare, together with termination of parental rights, or the child has been legally adopted,

the jurisdiction of the court shall continue over any child brought before the court, or committed under the provisions of this act, and the court shall have power to order a change in the custody or care of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change.

43-210. Delinquent children; adjudication; alternatives given to court for disposition of case. When any child is adjudicated to be a delinquent child, the court may:

(1) Continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged when the same is in the interest of the child's reformation or rehabilitation and, subject to the further order of the court, may:

(a) Place the child under the supervision of a probation officer;

(b) Permit said child to remain in its own home, subject to the supervision of the probation officer; or

(c) Cause the child to be placed in a suitable family home or institution, subject to the friendly supervision of the probation officer, *Provided*, that under subdivision (1)(a), (1)(b), or (1)(c) of this section upon a determination by the court that there are no private or other public funds available for the care, custody and maintenance of a child, the court may order a reasonable sum for the care, custody and maintenance of the child to be paid out of a fund which shall be appropriated annually by the county where the petition is filed, until a suitable provision may be made for the child without such payment; or

(2) The court may commit such child to the care and custody of the Department of Public Institutions.

43-210.01. Child in need of special supervision; orders permitted; commitment to Department of Public Institutions, when. When any child is found by the court to be a child in need of special supervision as defined by subdivision (5) of section 43-201, the court may enter such order as it is empowered to enter in the case of a delinquent child except that no such child shall be committed to the Department of Public Institutions until the court shall find:

(1) That said child has failed to make a satisfactory adjustment after a reasonable period of time under its original order; or

(2) Such commitment is necessary in the first instance for the protection of the health and welfare of said child or of society.

43-210.02. Juvenile court; commitment of children subject to act; hospital treatment; custody in state institutions; discharge. The court may, when the health or condition of any child within the terms of this act shall require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in an accredited and suitable private hospital or institution which will receive it for like purposes. If the court finds any such child to be feeble-minded as defined by section 83-219, it may, upon attaching the physician's certificate and the report as to the mental capacity provided by section 83-221, commit said child directly to the Beatrice State Home.

In no case shall a child committed under the terms of sections 43-201 and 43-202, sections 43-204 to 43-220, and sections 43-210.01 to 43-210.03 be confined after he

or she shall have reached the age of twenty-one years. The marriage of any child committed to a state institution under the age of twenty-one years shall not make such child of the age of majority. A child committed to any such institution shall be subject to the control of the superintendent thereof, and the said superintendent, with the advice and consent of the Department of Public Welfare or the Department of Public Institutions, whichever has supervision of the institution shall adopt bylaws for the promotion, paroling and final discharge of inmates such as shall be considered mutually beneficial for the institution and the inmates; *Provided*, upon final discharge of any inmate such department shall file a certified copy of the discharge with the court which committed said inmate.

43-210.03. Juvenile court; award of custody of child to other than parent; support of child; appropriation by county; liability of parents; proceedings to enforce. Whenever the care or custody of a child is given by the court to someone other than his parent, or when a child is given medical, psychological or psychiatric study or treatment under order of the court, and no provision is otherwise made by law for the support of the child or for payment for such study or treatment, compensation for the study and treatment of the child, when approved by order of the court, shall be paid out of a fund which shall be appropriated annually by the county where the petition is filed. In the same or subsequent proceeding, after summons to the parent of the time and place of hearing thereof as provided in section 43-512, the court may order and decree that the parent shall pay, in such amount as the court may direct, a reasonable sum that will cover in whole or in part the support, study and treatment of the child given after the decree is entered, which amount ordered

paid shall be the extent of the liability of the parent. The court in making such order shall give due regard to the cost of study, treatment and maintenance of the child and the ability of the parent to pay. Amounts thus received shall be transmitted to the person, agency or institution furnishing such study, treatment or maintenance and if a state agency or institution, transmitted by it quarterly to the Auditor of Public Accounts for credit to the proper fund. If the parent willfully fails or refuses to pay such sum, the court may proceed against him as for contempt. If execution shall issue at the request of any person, agency or institution treating or maintaining said child. The court may afterwards, because of a change in circumstances of the parties, revise or alter the order of payment for such study or treatment.

§ 43.211. Children under sixteen charged with crime; transfer from justice and police courts to juvenile court. When in any county where a juvenile court is held, as provided in section 43.201, a child under the age of sixteen years is arrested with or without a warrant, such child may, instead of being taken before a justice of the peace or police magistrate, be taken directly before such court; or if the child is taken before a justice of the peace or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court and the officer having the child in charge to take the child before that court. In any case the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon complaint or affidavit as herein provided. In any case the court shall require notice to be given and investigation to be made as in other cases under this act and may adjourn the hearing from time to time for that purpose.

43-212. Children under fourteen charged with crime; custody; detention; prohibitions; children under sixteen; detention; prohibitions. When a child under fourteen years of age is taken into custody the court or magistrate may place such child in the care of the sheriff, police officer or probation officer or other suitable person as the court or magistrate shall direct, who shall keep such child in some suitable place outside of the enclosure of any jail or police station. When any child under the age of sixteen years shall be detained in any institution to which adults are sentenced, it shall be unlawful to permit such child to have verbal, visual, or physical contact with such adults at any time.

43-213. Neglected, dependent or delinquent children; confinement; parole; Director of Public Institutions; duties; Parole and Group Home Unit; created. It shall be the duty of the Director of Public Institutions to maintain an agent of the Department of Public Institutions, whose duty it shall be to examine the homes of children paroled from institutions under its jurisdiction, for the purpose of ascertaining and reporting to the department whether they are suitable homes, to assist children paroled or discharged from such institutions or placed in foster or group homes in finding suitable employment, and to maintain a friendly supervision over paroled inmates during the continuance of their paroles. To administer the provisions of sections 43-213, 83-108.04, 83-465 and 83-472, the Director of Public Institutions shall appoint a supervisor of the Parole and Group Home Unit, which is hereby created, and such other parole officers as are necessary to carry out the purposes of sections 43-213, 83-108.04, 83-465 and 83-487.

43-214. Association receiving children; supervision by Department of Public Welfare; reports; statements.

All associations receiving children under this act shall be subject to the same visitation, inspection and supervision by the Department of Public Welfare as are the public charitable institutions of this state, and it shall be the duty of the department to pass annually upon the fitness of every such association as may receive or desire to receive children under the provisions of this act. Every such association shall annually, at such time as the department shall direct, make report thereto, showing its condition, management and competency to adequately care for such children as are or may be committed to it, and such other facts as the department may require. Upon the department being satisfied that such association is competent, and has adequate facilities to care for such children, it shall issue to the same a certificate to that effect; which certificate shall continue in force for one year, unless sooner revoked by the department. No child shall be committed to any such association which shall not have received such a certificate within fifteen months next preceding the commitment. The court may at any time require from any association receiving or desiring to receive children under the provisions of this act such reports, information and statements as the judge shall deem proper and necessary for his action, and the court shall in no case be required to commit a child to any association whose standing, conduct or care of children or ability to care for the same is not satisfactory to the court.

43-215. Neglected or dependent children; surrender by parents, etc., to institutions authorized; agreements; contents; effect. It shall be lawful for the parents, parent, guardian of any child, or other person having the right to dispose of a dependent or neglected child to enter into an agreement with any association or in-

stitution incorporated under any public or private law of this state or any other state, for the purpose of aiding, caring for, or placing such children in homes and, subject to approval as herein provided, to surrender such child to such association or institution, to be taken and cared for by such association or institution, or put into a family home. Such agreement may contain any and all proper stipulations to that end, and may authorize the association or institution by its attorney or agent to appear in any proceeding for the legal adoption of such child, and consent to its adoption; and the order of the court, made upon such consent, shall be binding upon the child and its parents or guardian, or other person, the same as if such person were personally in court and consented thereto, whether made party to the proceeding or not. All the publication or notice necessary for the adoption of any such children shall be that the institution or parties having charge of such children by court decree, or to whom a relinquishment of the child was given shall know that such legal adoption is being made.

43-216. Commitment of children; religious preference considered. The court in committing children under the provisions of this act shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of the child, or with some association which is controlled by persons of like religious faith of the parents of the child.

43-217. Industrial schools; laws applicable. Nothing in this act shall be construed to repeal any portion of the act to aid industrial schools for girls and boys.

43-218. Act, how construed. This act shall be liberally construed to the end that its purpose may be

carried out, namely, that the care, custody and discipline of a dependent, neglected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all cases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise.

43-219. County board of visitors; appointment; duties; reports; expenses. In each county the judge presiding over the juvenile court, as defined by this act, may appoint a board of four reputable inhabitants, who shall serve without compensation, to constitute a board of visitation, whose duty it shall be to visit as often as once a year, all institutions, societies and associations within the county, receiving children under this act. Visits shall be made by not less than two of the members of the board, who shall go together or make a joint report. The board of visitors shall report to the court, from time to time, the condition of children received by or in the charge of such associations and institutions, and shall make an annual report to the Department of Public Welfare and Department of Public Institutions in such form as each of the departments may prescribe. The county board may, in its discretion, make appropriations for the payment of the actual and necessary expenses incurred by the visitors in the discharge of their official duties.

43-220. Detention homes; power of county boards to provide. The several county boards of counties of Nebraska shall have the power and authority to appropriate the funds necessary to establish and maintain detention homes in connection with the juvenile courts of this state.

25-1937. Appeals; when right conferred but fails to prescribe procedure. When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. Appeals from the district court to the Supreme Court shall be taken in the same manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.